Supreme Court, U.S.
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**In The**

**Supreme Court of the United States**

**October Term, 1994**

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WINSTON WAYNE HUCKABY,
Petitioner

v.

THE STATE OF TEXAS

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On Petition For Writ Of Certiorari
To The Eleventh Court Of Appeals
At Eastland, Texas

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# PETITION FOR WRIT OF CERTIORARI

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84 pp

1. WHETHER PETITIONER MUST BE ACQUITTED WHEN HIS CONVICTION BY INSUFFICIENT EVIDENCE VIOLATES THE DUE PROCESS OF LAW CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. WHETHER PETITIONER MUST BE ACQUITTED WHEN ESSENTIAL ELEMENTS AND MEANS OF THE CHARGED OFFENSE ARE NOT PROVEN BEYOND A REASONABLE DOUBT.

3. WHETHER STATE EXHIBITS 1-46(A-C) AND 162-195 ARE INADMISSIBLE OR INSUFFICIENT EVIDENCE TO SUSTAIN PETITIONER'S CONVICTION.

4. WHETHER THE GENERAL VERDICT IS SO VAGUE AND UNCERTAIN IT VIOLATES THE DUE PROCESS OF LAW CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THERE IS INSUFFICIENT EVIDENCE AND THE RECORD DOES NOT IDENTIFY REQUIRED MULTIPLE COUNTS OF CONVICTION, AGGREGATED AMOUNT, AND GRADE OF OFFENSE.

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## OTHER COURT OPINIONS

The Eleventh Court of Appeals at Eastland, Texas, renders the unpublished opinion set out in the appendix.

## JURISDICTION

This is review of a final judgment by the highest court which a decision is had. It involves rights, privileges and immunities claimed under the due process of law clause of the 14th Amendment. On September 30, 1993, the judgment reviewed is rendered. Motion for rehearing is filed October 14, 1993, and overruled October 28, 1993. Petition for Discretionary Review in the Court of Criminal Appeals is filed November 17, 1993, and denied March 16, 1994. Motion to rehear said refusal is filed March 30, 1994, and overruled May 18, 1994. This Honorable Court has jurisdiction of this case pursuant to 28 U. S. C. A. 1257(a).

## CONSTITUTIONAL PROVISIONS

Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. 14th Amendment, United States Constitution.

## STATEMENT OF THE CASE

Chaotic business and bookkeeping practices at Longview Scrap and Metal prohibit proof beyond a reasonable doubt that any cash is stolen from there. The amount of cash there, and its location and flow, is not verifiable.

Longview Scrap and Metal buys scrap from fifty to sixty sellers each business day. And, it sells scrap to fifteen to twenty customers. These are usually cash transactions. (Statement of Facts, hereafter SF, Vol. IV, 57-58, 115).

There are three separate cash funds

at Longview Scrap and Metal. Cash used to buy scrap is in a "cash purchase drawer." (Hereafter "drawer"). The drawer is in an office safe or at the front office counter. (SF Vol. IV, 59-69, 100-120).

Cash used to purchase items that costs less than Twenty Dollars ($20.00) is in a "petty cash fund." (Hereafter "petty cash"). This fund is in the office safe. (SF Vol. IV, 59-60, 100-120).

Cash income from sales is immediately placed in a "cash sales bag." (Hereafter "bag"). The bag is always in the office safe. (SF Vol. IV, 59-60, 100-120).

Longview Scrap and Metal has twenty employees and five of them work in the office. Petitioner is a bookkeeper there. Owners and employees of Longview Scrap and Metal have frequent access to cash in the drawer, petty cash fund and bag. (SF Vol. IV, 108-110).

Each business day, twenty to forty voucher checks are drawn on the bank account of Longview Scrap and Metal. Two signatures are required on each check. As bookkeeper, Petitioner signs each check, and the other signature is obtained from one of the two owners, Sidney Allen or Ed Steele. (SF Vol. IV, 84-86).

A check protector is used, and it perforates the amount payable and the words "Longview Scrap and Metal" on each check. This perforation is after signatures are obtained and after the original and carbon copies of voucher checks are separated. No one testifies that Petitioner uses the check protector. Sidney Allen and Ed Steele use the check protector. (SF Vol. IV, 78-80, 93-94, 132-134, 178-179, 250-252, Vol. V, 320).

State Exhibits 1-46 are supposed to have parts A, B and C. Part A is an

original check of Longview Scrap and Metal that is negotiated for cash. Part B is the carbon copy of Part A or a check book stub. Part C is a record referring to the cash purchase drawer, the petty cash fund or a transaction between Longview Scrap and Metal and Coils Plus who sells scrap to the former. No state exhibit pertains to the cash sales bag. (SF Vol. IV, 169-170 Vol. V, 282-283, 322).

Petitioner is indicted for forty-five separate incidents of alleged theft at Longview Scrap and Metal, during twenty-five months, pursuant to one scheme and continuing course of conduct. The alleged amount stolen is at least $20,000 or more.

The Court of Appeals notes that Petitioner is convicted of theft in a series of 46 transactions in which there are <u>discrepancies</u> between the actual amount of a check of Longview Scrap and

Metal and recorded amounts. And said Court observes the sums on the checks have been altered or added and checks have white outs. One transaction is not in the indictment.

The State contends any change in Parts A-C of its forty-six exhibits is a discrepancy. This is especially true when a the sum on a negotiated check is higher than sums on parts B and/or C. And the State contends Petitioner steals from Longview Scrap and Metal because he and his wife make cash deposits over several thousand dollars in their bank account.

Tremendous cash demand and flow, chaotic business and bookkeeping practices, the desire to evade taxes and higher insurance premiums, and the intentional destruction of all records of income in the cash sales bag, and internal loans from it, prohibit proof that any

cash is missing from Longview Scrap and Metal. And reasonable doubt exists that Petitioner commits any theft from there.

For example, no court or witness can or did say cash is missing from Longview Scrap and Metal. Its accountant, who is a state witness, inspects the state exhibits before trial. He says, "he didn't see cash taken anywhere." (SF Vol. V, 396-397). And he says, "there is nothing to trace why there would be a discrepancy in this, nothing that I could locate in the records at hand." (SF Vol. V, 356). Referring to the forty-six state exhibits, the prosecutor admits "That's fine." "That doesn't prove anything." (SF Vol. IV, 23-27).

The accountant asks Sidney Allen if there are any other transactions that he should consider to explain discrepancies in the forty-six exhibits. Allen, nor any

other employee, tells the accountant about (1) hiding income and (2) loans from the cash sales bag. (SF Vol. IV, 107-108, 136-138, 264-265, Vol. V, 385).

The cash sales bag has an estimated $4,000.00 to $5,000.00. The cash purchase drawer contains $3,500.00 to $7,500.00. This large amount of cash in the drawer is needed to buy scrap and for other purposes. Cash demand is still so great that loans of cash are often made to the drawer from funds in the cash sales bag. When this is done, notes of the amounts borrowed are placed in both the drawer and cash sales bag. This is to insure correct internal cash reimbursement of the bag. (SF Vol. IV, 58-62, 89-91, 101-107, 180-8181, 264-265, Vol. V, 285-286, 328).

Funds in the cash purchase drawer are used to pay employees. These cash payments to employees evade withholding

taxes, reduce premiums for workers compensation insurance, and increase the demand for cash from the drawer. (SF Vol. IV, 140-143, 190-193).

All sales receipts are destroyed, and all notes of loans from the bag to the cash purchase drawer are thrown away. Sidney Allen orders the destruction of all these records. (SF Vol. IV, 107-108, 136-138, 264-265).

The Court of Appeals notes a check for cash is negotiated every day to replenish the cash purchase drawer. This check is often written over the amount of the cash purchase tickets in the drawer in order to secretly reimburse the cash sales bag. When this occurs there is a discrepancy that cannot be explained by the State's exhibits or other records of Longview Scrap and Metal. And when this occurs, there is no theft. State

witnesses admit these practices at Longview Scrap and Metal. (SF Vol. IV, 101-104, 108, 140, 142-143, 180-181, 190-193, 238-240, 264-265, Vol. V, 281-282, 285-286).

There is reasonable doubt and insufficient evidence that the forty-six state exhibits, and their subparts, are means of theft. They are pure speculation and mere suspicion. When viewed in perspective, said exhibits are inconsequential.

Longview Scrap and Metal conducts business six days a week. Sidney Allen says twenty (20) to forty (40) checks are signed each day. Taking 30 checks a day as an average, 180 checks are written each week at Longview Scrap and Metal. Using four weeks a month for the twenty-five month period in question, checks are written for 100 weeks. These means 18,000

checks are written during the time period of the 46 discrepancies. Dividing 46 discrepancies by 25 months, a discrepancy occurs on the average of 1.84 times a month. It is reasonable that these are reimbursements to the cash sales bag that Sidney Allen orders.

State exhibits relating to the petty cash fund are no evidence of theft. Notes on these exhibits indicate the cash sales bag must be reimbursed. The accountant says a standard way to increase the amount of the petty cash fund is to write a check for more money, and the pertinent exhibits may reflect simple increases of the petty cash fund. (SF Vol. V, 393-395, Vol. VI, 563-649). When checks for this fund are cashed, the original check and its voucher copy are often the same amount. (SF Vol. VI, 579, 581, 613, 615, 635, 637 and 646).

Petitioner's endorsement of any State

exhibit is not evidence of theft. It is first admitted, and later retracted, other employees receive cash at the bank for checks that are endorsed by Petitioner. (SF Vol. IV, 97-98, 207-2089, 258-262). And it is incredible, but Petitioner is charged with theft when another employee endorses a state exhibit! (State Exhibit 32A, SF Vol. VI, 806-812, Tr. 5).

In three different transactions, the State alleges theft by Petitioner where parts A-C of the state exhibits match. This contradicts the theory on which this case is prosecuted. (SF Vol. V, 349-356, State Exhibits 44-46).

The forty-six exhibits of the state, and their subparts, are insufficient evidence theft. There is no showing of the amount of cash at Longview Scrap and Metal, or that any cash is missing from there. (SF Vol. IV, 107-108, 136-138,

264-265, Vol. V, 385). Cash balances of the safe, petty cash fund, cash sales bag and cash purchase drawer are not established. There is no assertion money is missing from the cash sales bag or safe. (SF Vol. V, 285).

Cash flow is not carefully monitored at Longview Scrap and Metal. When money is obtained from the bank by cashed checks, it is placed in the office safe. All employees presume Petitioner places all cash that he receives for Longview Scrap and Metal in the office safe when he returns from the bank. When cash is needed, it is taken from the safe and placed in the cash purchase drawer, petty cash fund and cash sales bag. Several employees of Longview Scrap and Metal obtain cash from the bank, place it in the safe and later disburse it to the three funds. (SF Vol. IV, 97-99, 208, 247-249,

258-269).

Cash deposits in the bank account of Petitioner and his wife are no evidence of theft. Both make cash deposits. They each work, from time to time, at two or more jobs a day. At times they are both paid in cash, and a relative loans cash to Petitioner's wife. During the time period in question, the cash deposits, in the personal account of Petitioner and his wife, average $1,236.93 a month. For two hard working persons, these are not excessive cash deposits. (SF Vol. V, 416-418, 445-456, 466-472, 475-476, 479-497).

And cash deposits in the bank account of Petitioner and his wife do not prove his theft of $20,000.00 or more as alleged. Dates of the alleged discrepancies at his work, and of cash deposits in the subject bank account, are in the record. There is no connection

between these dates. And there is no statement in the opinion of the Court of Appeals that the dates of cash deposits in Petitioner's bank account coincide with dates of alleged discrepancies at Longview Scrap and Metal.

INADMISSIBLE AND INSUFFICIENT EXHIBITS

The necessary predicate for the admission of crucial state exhibits is not met. They are introduced over timely objection that underlying information is lacking, there is no showing that the underlying information is correct, or that any summaries are necessary because of voluminous records.

The Court of Appeals errs when it says these state exhibits do not indicate lack of trust worthiness and that Petitioner did not raise evidence or contend that the exhibits are incorrect or unreliable. At pages 28-29 of his brief

in the Court of Appeals, Petitioner does raise questions about the underlying sources of information and methods of preparation of the state exhibits, and he clearly contends the exhibits are untrustworthy. Although misconstrued, Petitioner's timely objections to the admission of these exhibits is noted.

The exhibits are unreliable because, had the underlying documents been kept and not destroyed, reimbursements to the cash sales bag and the petty cash fund would be revealed. The evidence clearly raises lack of trust worthiness about the exhibits themselves and their source of preparation.

VAGUE AND UNCERTAIN VERDICT

Prior to verdict, the jury foreman inquires "Do we have to decide on the overall charge of theft, or does each incident have to be conclusive?" The

trial judge instructs the jury it can convict Petitioner if it finds that at least two (2) thefts occurred pursuant to one (1) scheme and continuing course of conduct, and the amount stolen is at least $20,000.00. This relieves the prosecution from proving all 45 incidents of theft in the indictment and an additional allegation of theft presented at trial.

Following the Court's instructions, the jury must necessarily consider numerous combinations of alleged offenses set out in the charge. Review of the record cannot establish the combination(s) of conviction, the specific amounts of aggregation, and the grade of offense that arises from said aggregation. The general verdict gives no certain and definite finding by the jury. After the verdict, the trial judge imposes restitution of $51,800.00 as a condition of Petitioner's

parole. Less $100.00, this is the total amount of the alleged discrepancies in the forty-six transactions in question. The judgment herein is void because the evidence is insufficient to authorize a judgment of conviction. The Trial Judge overrules Petitioner's request for the jury to return a verdict on specific counts in order to raise an insufficient evidence challenge to any and all findings of guilt, and Petitioner's objections that the evidence is insufficient to support a general verdict of guilt are overruled. (SF Vol. V, 503-507, 553-561).

ALL QUESTIONS ARE TIMELY RAISED BELOW

The Trial Judge denies Petitioner's motion for instructed verdict that there is insufficient evidence to convict him and his conviction would violate the due process of law clause of the United States Constitution. (SF Vol. V, 349, 454-459).

At trial, Petitioner objects that the evidence is insufficient to support a general verdict of guilt. (SF Vol. V, 503-507). The Trial Judge overrules Petitioner's clear timely objections that supporting documentation is needed to establish the veracity of Exhibits 1-46(A-C), 48A and 162-195, and for their admission in whole or in part. And Petitioner further contends, that as admitted, the first forty-six exhibits, and their subparts, indicate lack of trustworthiness in the method and or circumstances of their preparation and source of information. (SF Vol. IV, 65-67, 71-72). In his objections to the Court's charge, Petitioner objects to variance between the indictment that lists 45 conjunctive counts, and the charge that authorizes a disjunctive conviction on any combination of 46 counts that aggregate

$20,000.00 or more. (SF Vol. V, 503-507). Before return of the verdict, Petitioner requests that the jury identify the specific counts on which he is convicted. (SF Vol. V, 557). Petitioner's objections and requests are denied.

All questions herein are presented and argued in the Court of Appeals by brief, oral argument and motion for rehearing. The questions are further presented in the Court of Criminal Appeals, the court of last resort, by a petition for discretionary review and a motion for rehearing the denial of said review. All relief is denied by state courts.

**REASONS TO ALLOW THE**

**WRIT OF CERTIORARI**

No theft can ever be proved by the alleged means of theft in this case. The State's alleged proof, and means of theft,

does not exclude all reasonable doubt concerning the charge against Petitioner.

The presumption of innocence is mandated on federal constitutional grounds. In every criminal trial, the prosecution has the burden of proof beyond a reasonable doubt on each and every element of an offense. **In re Winship**, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1966). In **Winship**, this Honorable Court holds the due process clause of the 14th Amendment to the United States Constitution protects the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." A "reasonable doubt" is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. **Geesa v. State**, 820 S. W. 2d 154, 162 (Tex. Crim.

App. 1991).

If the evidence, viewed in the light most favorable to the verdict or judgment, gives nearly equal support to theories of innocence and guilt, the evidence is insufficient. A reasonable jury must entertain reasonable doubt. **Clark v. State**, 755 F.2d 394, 396 (5th Cir. 1985).

Equally reasonable explanations, other than guilt, that arise from this record are (1) that no cash is missing from Longview Scrap and Metal, (2) State Exhibits 1-46(A-C) are means to reimburse the cash sales bag or increase the petty cash fund, and (3) intentional practices at Longview Scrap and Metal render tracing of cash impossible thereby precluding proof of any theft of money from there.

No witness testifies that cash is missing at Longview Scrap and Metal. The opinion of the Court of Appeals does not

say that any cash is missing from there. Alleged discrepancies in the State's Exhibits are emphasized by the Court of Appeals. However, these "discrepancies" are not proof beyond a reasonable doubt that Petitioner commits theft over $20,000.00. The company accountant says "there is nothing to trace why there would be a discrepancy in this, nothing that I could locate in the account records in hand." (SF Vol. V, 356, 396-397).

During its case, the State emphasizes the use of a check protector. According to its theory, the perpetrator of the alleged theft must use the check protector. The check protector has to encode, by perforation, the correct amount of the check. The other numbers on the check have to correspond to the payable perforated sum in order for the check to be negotiated. When the record is

completely silent about any use of the check protector by Petitioner, which is an alleged means of theft under the scenario of the State, there must be Petitioner's acquittal. Since Sidney Allen and Ed Steele use the check protector (SF Vol. IV, 93-94), an alleged means of theft, there can be no finding beyond a reasonable doubt that only Petitioner uses the check protector on the exhibits in question.

The Court of Appeals errs when it just assumes that cash deposits in the bank account of Petitioner and his wife prove his theft of $20,000.00 or more from Longview Scrap and Metal. The myriad transactions discussed in the record of this case, whether at the offices of Longview Scrap and Metal or in Petitioner's bank account, make it impossible to establish (1) that any funds

were taken by Petitioner from Longview Scrap and Metal; (2) that these funds are $20,000.00 or more; and (3) that there is a sufficient number and amount of deposits connected to the dates of the alleged discrepancies in question.

The ruling by the Court of Appeals violates the due process of law clause of the 14th Amendment. Said Court's method of reviewing the evidence in this case, and its findings and judgment, is contrary to **In re Winship**, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 2d 368 (1966) which requires that a conviction must be based on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which Petitioner is charged.

The record in this case must, and it does not, reveal the existence of sufficient evidence at trial to justify a rational trier of fact finding each and

every element of the charged offense. Petitioner's conviction must be reversed and his acquittal ordered. **Burks v. United States**, 437 U.S. 1, 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

Part C of the first forty-six state exhibits does not have supporting documentation. Exhibits 162 through 192 are the face sheets of Petitioner's bank account where monthly deposits and check transactions are noted. Copies of the checks are not enclosed with the monthly statement. There is insufficient supporting documentation for the admission of these exhibits. The Court of Appeals clearly errs in holding that said exhibits are admissible, whether as originals or summaries. **Black Lake Pipe Line Co. v. Union Const. Co**, 538 S. W. 80, 92-95 (Tex. 1976).

There is no inherently reliable

part "C" to the first forty-six exhibits. Reimbursements to the cash sales bag are intentionally covered up. The State contends it does not matter if the backups to part "C" are wrong. It does matter when the underlying sources of information or the method or circumstances of preparation of records indicate lack of trustworthiness, and they are used to convict Petitioner. **R.R. Com'n of Texas v. Rio Grande Valley Gas**, 683 S. W. 2d 783, 788-789 (Tex App.-Austin, no writ), **United States v. Williams**, 661 F.2d 528, 531 (5th Cir. 1981); TEX. R. CRIM. EVID. 803(6). Part "C" is not admissible. **United Pacific Ins. Co. v. Jones**, 710 S. W. 2d 760, 762 (Tex.App.-Beaumont 1986, ref'd. n.r.e.).

The due process of law clause of the 14th Amendment requires sufficient evidence to sustain a conviction. An

insufficient evidence challenge to a multiple count conviction, requires identity of said counts with certainty in order to clearly present and address this challenge. Requiring a special verdict on each count where it is needed is specifically recognized as flexible due process. **Zinermon v. Burch**, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990); **Morrissey v. Brewer**, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed. 484 (1972).

Federal law requires specific findings of guilt for each offense by a jury where several offenses are alleged in an indictment. When this is not done, and where one or more of the alleged offenses fails because of insufficient evidence to sustain a conviction thereon, the conviction is reversed because of an uncertain verdict. **U.S. v. Garcia**, 907 F. 2d 380 (2nd Cir. 1990). The factual

statement herein shows that, as a matter of law, the counts against Petitioner fail because of insufficient evidence. And the general verdict in this case is otherwise uncertain.

**CONCLUSION**

The writ of certiorari should issue, Petitioner's conviction should be reversed, and an acquittal of Petitioner should be ordered.

Respectfully submitted,

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11th Court of Appeals

Eastland, Texas

Opinion

Winston Wayne Huckaby

Appellant

Vs. No. 11-92-102-CR -- Appeal from Gregg County State of Texas

Appellee

The jury convicted Winston Wayne Huckaby of theft of at least $20,000.00 and assessed punishment at confinement for three years plus a fine of $10,000.00. We affirm.

Appellant's first five points of error involve the sufficiency of the evidence. In deciding a challenge to the sufficiency of the evidence, we must review the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could

crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Geesa v. State, 820 S.W. 2d 154 (Tex. Cr. App. 1991). The jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given their testimony. Bonham v. State, 680 S.W.2d 815 (Tex.Cr.App.1984), cert. den'd, 474 U.S. 865 (1985).

The record reflects that the appellant was a bookkeeper for Longview Scrap and Metal, Inc. He was convicted of theft in a series of 46 transactions in which there were discrepancies between the actual amount of a Longview Scrap and Metal, Inc. check and the amount which was recorded. The total amount of the 46 discrepancies was $51,900.00.

Appellant went to work for Longview Scrap & Metal, Inc. in late 1988 or early 1989. Sidney Allen, one of the owners of the business, saw carbon duplicates of original checks on appellant's desk while appellant was gone on vacation in June of 1991. When he looked in the checkbook to verify that the checks had been recorded in the check register so that the bank balance would be up to date, Allen discovered that the amounts on the carbon duplicate checks differed from the amounts written in the check register. A number of carbon duplicates and one of the original checks showed white outs. On other checks, numbers had either been altered or added. For example, on one check the original check was for $1,735.61 while the carbon duplicate check was only for $735.61. On another check, the original check was for $850.00, but the

carbon duplicate was for $350.00.

Appellant prepared all of the original checks and all of the carbon duplicates or check stubs as to each of the 46 transactions. Appellant was the one who maintained the check register and reconciled all bank statements. He was the one who saw the canceled original checks. June Delores Shull, an assistant who helped appellant, testified that appellant was protective of things in his office. On one occasion, he questioned her about what she was doing when she was putting some check stubs and copies of checks in the file. Neither Allen nor Edward Steele, Jr., the other owner of the business, gave appellant consent to take cash or to take money from the business other than his weekly paycheck.

Longview Scrap and Metal, Inc. bought iron, metal, and aluminum scrap to

resell to steel mills and smelters. The business purchased metal from an average of 50 to 60 customers a day. These customers were paid in cash at the time they came in. Coils Plus, a manufacturing business, was a major customer.

When a customer came in, the metal was weighed. A ticket noting the weight and type of metal purchased and the amount paid by the scrap business was signed by the customer. The customer was then paid in cash from the cash drawer. An average of $3,500.00 to $7,500.00 was usually kept in the cash drawer to pay customers.

To replenish the cash drawer, office personnel would add up the purchase tickets signed by customers and determined the total expended on metals purchased. Steele would also make a visual check of the cash drawer to determine how many bundles were needed of each currency

denomination. Steele would then ask appellant to write a check for cash in the amount determined to be needed. When a check was cashed to replenish the cash drawer or petty cash fund, the person receiving the cash was required to endorse the back of the check. Appellant's endorsement was on the back of 45 out of the 46 checks for cash.

Each business day, a balance sheet was prepared for the cash drawer. The balance sheet noted the amount of cash on hand in the drawer plus the amounts of the signed tickets for the day's cash purchases of metals from customers. The sum of those amounts was to equal the sum of the previous day's cash balance and checks. There would always be at least one check for cash each day to replenish the cash drawer.

Sometimes, during the day, it would

be necessary to replenish the cash drawer. and money was borrowed from the cash sales bag[1] until there was time to go to the bank. When money was borrowed from the cash sales bag, a note would be placed in both the cash sales bag and the cash drawer. When the money was replaced, the transaction was completed, and the notes were destroyed. The amounts on the checks, the check stub or carbon duplicate and the notations on the balance sheets for the cash drawer, the petty cash vouchers, and the purchase invoices for the 46 transactions involved in this case should have all been the same, even if the cash sales bag was borrowed from and reimbursed. However, the record reflects that there were discrepancies.

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[1]The cash sales bag was the fund of cash received from those who purchased material from the scrap business.

Th· 1990 tax return for appellant and his wife showed total wages of $24,559.00. The checking account of appellant and his wife for 1989 showed total credits of $38,973.89 and total debits of $36,526.83; for 1990 total credits of $47,648.21 and total debits of $49,550.28; and for January through July 1991 total credits of $29,586.07 and total debits of $29,159.67. A total of $31,623.15 was deposited in currency to appellant's account from June 1989 through July 1, 1991. Appellant was paid by check and appellant's wife was usually paid by check. If she was ever paid in cash by her employer, it was only a total of $200.00 to $300.00. Mrs. Huckaby's sister loaned her less than $5,000.00 in 1989, less than $4,000.00 in 1990, and less than $1,000.00 in 1991.

In urging the insufficiency of the evidence, appellant relies on cases

concerning whether the evidence excludes every reasonable hypothesis other than the defendant's guilt. Appellant's trial commenced on April 21, 1992, after the opinion in Geesa v. State, supra, which rejected further use of the "reasonable hypothesis analytical construct" in circumstantial evidence cases. Accordingly, the cases appellant relies on are no longer applicable. After viewing all of the evidence in the light most favorable to the verdict, we conclude that the evidence is sufficient for a rational fact finder to have found beyond a reasonable doubt that appellant committed theft of at least $20,000.00. Having determined that the evidence is sufficient, discussion as to each point relating to factual insufficiency is unnecessary. Appellant's first five points of error are overruled.

In his sixth point of error, appellant complains of the admission of State's Exhibit Nos. 1 through 46, a, and 162 through 195 were admitted as summaries under TEX.R.CRIM.EVID. 1006. Exhibit Nos. 1 through 46 documented the check transactions for cash on which this prosecution was based. Exhibit Nos. 1 through 12 related to reimbursement of petty cash, Exhibit Nos. 13 through 40 and 44 through 46 related to replenishment of the cash drawer, and Exhibit Nos. 41 through 43 related to cash for purchase of metals from Coils Plus.

Exhibit Nos. 1 through 46 each consisted of 3 parts. Part A was the original check; Part B was the check stub or carbon copy duplicate of the original check; and Part C was the petty cash voucher, the balance sheet prepared for the cash drawer, or the invoice for

purchase of metals from Coils Plus. Part C did not include documents proving the correctness of the figure noted on the balance sheet as the amount of the previous day's cash balance.

Exhibit Nos. 162 through 192 were monthly statements of appellant's bank account. These exhibits consisted of the face sheet of the statement noting the deposit and check transactions. Copies of the checks were not enclosed with the monthly statement.

Appellant contends that, without putting supporting documents in the record to establish the veracity of Part C to Exhibit Nos. 1 through 46 and Exhibit Nos. 162 through 192, there is no proper predicate for the admission of these documents and their summaries. Appellant's specific complaint is that the State failed to produce documentation

concerning the underlying calculation of the figures reflected on Part C of Exhibit Nos. 1 through 40 and 44 through 46 (relating to cashed check transactions for replenishment of the cash drawer) and failed to produce the original checks enclosed with each monthly bank statement of Exhibit Nos. 162 through 192. We disagree that such underlying documents were necessary predicate for the admission of the business records and summaries.

Rule 803 (6) provides that records of a regularly conducted business activity, recorded as part of a regularly conducted business activity, and made by or from data provided by a person with knowledge unless the source of information or the method of preparation indicates a lack of trustworthiness.

Allen testified that he was the custodian of the records in Exhibit Nos. 1

through 46; that they were kept in the regular course of business of Longview Scrap and Metal, Inc.; that it was routine practice for the business to keep such records; and that the information contained in the records was recorded by someone with personal knowledge. Rhonda McFarland, the custodian of monthly bank statement records reflected in Exhibit Nos. 162 through 192, testified that the exhibits were monthly bank statements of appellant and his wife and that such records were routinely produced for White Oak State Bank in the regular course of business by someone with personal knowledge. She further testified that, when the bank produces the monthly statements, they count the checks that go with the statements and mail them out to the customer. The transactions are posted near the dates of the transactions shown

on the monthly statement.

The evidence of the source and preparation of the record exhibits did not indicate a lack of trustworthiness, nor did appellant raise evidence or contend that the exhibits were incorrect or unreliable. We conclude that the predicate was adequately met for Exhibit Nos. 1 through 46 and 162 through 192 to be properly admitted as business records.

Exhibit No. 48A summarized Exhibit Nos. 1 through 46. Exhibit Nos. 193 through 195 were the yearly summaries for 1989 through 1991 of the monthly statements in Exhibit Nos. 162 through 192. McFarland testified that Exhibit Nos. 193, 194, and 195 were true, accurate, and correct summaries of appellant's bank statements for each of the three years and that she reviewed the actual statements to verify the accuracy

of the summary figures. She also testified that the summaries would aid her in her testimony explaining appellant's account. The record reflects that all of the statements to support the three summaries were produced in court as Exhibit Nos. 162 through 192. James Duncan Pollock, Jr., the certified public accountant who examined the books of the business for discrepancies, testified that Exhibit No. 48 was the summary of his examination and findings of discrepancies. The document was routine in his business to keep such documents; and the events recorded on the document were recorded near or at the time they occurred. The summary was recorded by a staff person under his supervision from information he gave her. He had gone through the original records and marked the documents she was to include on the summary.

Pollock further testified that he is the custodian of the record reflected as Exhibit No. 48. The record reflects that documents used to prepare Exhibit No. 48 were produced in court. Certain heading designations on the summary were deleted pursuant to appellant's objections; and the summary with the deletions ordered by the court was admitted as Exhibit No. 48A, the pertinent exhibit on appeal.

Rule 1006 provides:

> The contents of voluminous writings, recordings, or photographs, otherwise admissible, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicated, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in

court.

As noted above, appellant's complaint at trial was the lack of proper predicate for the admission of documents and their summaries because the State did not produce underlying documentation of calculations for the cash drawer balance sheets and the original checks noted in appellant's bank statements. We conclude that the predicate of Rule 1006 was met. Exhibit Nos. 48A and 193 through 195 were properly admitted as a business record. The sixth point of error is overruled.

In his seventh point of error, appellant complains of the jury charge. The indictment charged 46 incidents of theft pursuant to one scheme and continuing course of conduct with and aggregate value of at least $20,000.00. When "amounts are obtained...pursuant to one scheme or continuing course of

conduct...the conduct may be considered as one offense and the amounts aggregated in determining the grade of offense." TEX. PENAL CODE ANN. Sec. 31.09 (Vernon 1989).

Appellant complains that the indictment charged in the conjunctive and that the jury charge was in the disjunctive. The conjunctive/disjunctive system of pleading and charging is not error. Kitchens v. State, 823 S.W.2d 256 (Tex.Cr.App.1991).

Appellant also complains that the general verdict form for guilt was improper. He urges that, under TEX. CODE CRIM. PRO. ANN. art. 37.07, Sec. 1(c) (Vernon 1981) where the charging instrument contains more than one count, the jury must return findings in a separate verdict as to each count and cffense submitted to them. As discussed above, the indictment charged a number of

incidents of theft pursuant to one scheme or continuing course of conduct which were all considered as one offense. Where there is but one offense charged in the indictment, the general verdict form is proper. Aguirre v. State, 732 S.W.2d 320 (Tex.Cr.App.1987); Escobedo v. State, 805 S.W.2d 860 (Tex.App. - Corpus Christi 1991, no pet'n).

Appellant additionally complains of the court's clarification of the charge. During deliberations, the jury sent the following note:

> Do we have to decide on the overall charge of theft, or does each incident have to be conclusive?

In response, the court gave the following clarification instruction:

> Our law provides that a conviction for the offense

> of theft of property over the value of twenty thousand dollars may be obtained if the evidence proves beyond a reasonable doubt that at least two thefts occurred pursuant to one scheme and continuing course of conduct, and the amount stolen was at least twenty thousand dollars.

Appellant contends that, where an indictment charges a number of incidents of theft pursuant to one scheme or continuing course of conduct, the jury must find that the defendant committed each and every incident of theft to support the conviction. We disagree.

A charge which authorizes conviction for theft pursuant to one scheme and continuing course of conduct on less than

indictment but theft in an amount of at least the aggregate value pleading is not error. The jury was not required to find that appellant committed each of the 46 incidents of theft to support the conviction as long as the charge authorized conviction only if the value of the property stolen was at least $20,000.00, the aggregate value pleading in the indictment. See Lehman v. State, 792 S.W.2d 82 (Tex.Cr.App.1990). The seventh point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

September 30, 1993

Do not publish. See TEX.R.APP.P. 90.

STATE V. WINSTON WAYNE HUCKABY

#19,355-B IN THE 124TH DISTRICT COURT OF GREGG COUNTY, TEXAS. TRIAL COURT RULINGS IN RECORD OF TRIAL ON APRIL 22-24, 1992.

P. 349 MR. SUPERCINSKI: Excuse me, Judge. In the indictment, there is no count at all dealing on the 26th day of September, 1990. And there's one on or about the 10th day of October, 1990.

THE COURT: I overrule the objection because of the way it's drawn.

MR. SUPERCINSKI: May it please the Court? A conviction based on no evidence or insufficient evidence violates the due process of law clause of both the United States Constitution and the Texas Constitution. This is such a case. The undisputed evidence shows the accounting

records in question -- the record in question were not kept according to standard recognizable procedures as testified to by Mr. Jim Pollock. The evidence also establishes that the only thing that was shown in this case was records that weren't kept in accordance with standard accounting procedures. Specifically, there is no evidence, nor a scintilla of evidence, and certainly insufficient evidence to raise e any question of , one , there being any funds missing from Longview Scrap and Metal, and number two, that there were any funds taken from Longview Scrap and Metal, and three, that the Defendant, Mr. Huckaby appropriated any fund from Longview Scrap and Metal and applied them for whatever reason without the effective consent of the owner, Mr. Sidney Allen. There being no evidence, not a scintilla of evidence,

and certainly insufficient evidence to establish any of the elements of the offense certainly violates due process of law clauses of both the Texas Constitution and the United States Constitution. Next, the undisputed evidence is that the State has introduced a variance in the Indictment -- in between the variance in the Indictment and the evidence. The -- particularly, there was brought up by the State instruments dated September the 26th, 1990, which the State alleges that constituted an offense occurring during the entire month of September of 1990. And that is such a material variance between the Indictment and the evidence, that an instructed verdict should be granted, because it does not give this Defendant any notice, and the State had used it in its compilation of what it alleges to be funds that were missing or

taken. The next point is that the evidence also establishes as a matter of law that the State had produced inconsistent theories of evidence, the theory being that all parts of the blue back exhibits -- being the check listed as Exhibit A, the check voucher or the check stub to be listed as Exhibit B, and either the following documents listed as Exhibit C, whichever were applicable, which would be the petty cash drawer, the cash purchase drawer, or the invoices of Coils Plus -- that they should all match. And the uncontradicted evidence is that at least three of those instruments, particularly Exhibits 44, 45, and 46, do match as to those particulars. but yet the State then attempts to come in and say, will there's some underlying other factors there, and therefore, there must be another shortage. And this is another

reason why the evidence is also insufficient, no evidence, nor a scintilla. Further, the State has alleged -- and all of said amounts were obtained in one scheme and continuing course of conduct, and the aggregate amounts of such amount stolen was at least twenty thousand dollars and more. And the State had also put all of the counts, except for the one listed first on May the 30th, 1989, thereafter has listed the counts with the conjunction and. And the evidence being insufficient as to there being no evidence, insufficient evidence, nor a scintilla of evidence to support any of these counts, or even one of these counts, renders unjustifiable a general verdict on the evidence. For these reasons, the Defendant prays that this Honorable Court withdraw this case from the Jury and direct a verdict acquitting the Defendant

of all counts in this Indictment.

THE COURT: The motion is denied.

MR. SUPERCINSKI: Note our objection.

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THE COURT: Let's see if the State has got any.

MR. NOVY: No, Your Honor.

THE COURT: Okay. Now you, Mr. Supercinski.

MR. SUPERCINSKI: Judge, I have objections to the Charge on the very first page, introductory paragraph, where it describes the offense in the Indictment because it omits at that point, which is a very important point, the allegations about this being one continuing scheme and continual course of conduct. It does put everything in the -- and also, it omits the conjunctive language of the allegations. It doesn't submit the and part there that should be by each and

every one of those offenses because they were listed as separate paragraphs. Now, the Court -- to show the seriousness of the omission, because it's an accurate description of the offense in the Indictment. And then -- and that must be put in there to be continuous and consistent with the later instruction from the Court where -- now if you find beyond a reasonable doubt that on or about -- .

THE COURT: The application paragraph.

MR. SUPERCINSKI: Yeah, the application paragraph, but it doesn't under the descriptive paragraph.

THE COURT: But the description is the offense of theft over twenty thousand dollars. That's the offense to find -- .

MR. SUPERCINSKI: Yes, sir. But it should describe the Indictment accurately, and it doesn't in this case.

THE COURT: Well, it does.

MR. SUPERCINSKI: And the continuing scheme allegation is extremely important. It's an essential element of the offense. So therefore, an essential element of the offense is not described in the descriptive paragraph. The other objection that we have is that -- are insufficient evidence and no evidence and not a scintilla of evidence to even raise the question of charging to the Jury. If the Court wishes, I will again spell those out in detail.

THE COURT: Well, I know where you're coming from. I fully understand.

MR. SUPERCINSKI: But I would like to renew the same language that I had in my motion for instructed verdict and lodge that as an objection, you know, based on the insufficiency of the evidence, and no evidence, nor a scintilla of the evidence,

and our due process of law grounds in the United States Constitution and the Texas Constitution. And with those, Judge, we would rest on the Charge. We feel the rest of it complies with the law.

THE COURT: Is that all the objections?

MR. SUPERCINSKI: Yes, sir.

THE COURT: Okay. They are noted.

MR. SUPERCINSKI: Well, with our -- of course, our objection to the sufficiency of the evidence.

THE COURT: Yes, sir. I understand that. And that conforms to -- it is couched in terms of the language used in the motion for instructed verdict, which the Court denied.

p.557

Now the other thing I request, if you're going to give this instruction, and if you're going to allow the Jury to go

contrary against the Indictment and your previous instructions, is that you specifically instruct them to give the date of the offense in which they find, if there is a conviction, so that we can know which ones that they're talking about because this evidence of insufficient -- this also shows that there is insufficient evidence to support all that Indictment, and a general verdict cannot be returned when there is insufficient evidence. Okay. Those are our objections. And if you're also going to give this, we would request argument -- further argument.

THE COURT: And I thought that might be permitted, but I can't find that.

MR. NOVY: I thought it was too, Judge, and I can't find it either.

we have.

NO. 11-92-00102-CR

IN THE COURT OF APPEALS

FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

AT EASTLAND

**********

WINSTON WAYNE HUCKABY APPELLANT

VS.

THE STATE OF TEXAS APPELLEE

**********

APPEALED FROM THE 124TH JUDICIAL DISTRICT COURT OF GREGG COUNTY, TEXAS

**********

APPELLANT REQUESTS ORAL ARGUMENT

**********

BRIEF OF APPELLANT

**********

TO THE COURT OF APPEALS:

**POINT OF ERROR ONE (RESTATED)**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THE PRESUMPTION OF INNOCENCE OF APPELLANT ALONE IS SUFFICIENT HEREIN TO ACQUIT HIM.

**POINT OF ERROR TWO (RESTATED)**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE REASONABLE DOUBT EXISTS ABOUT HIS GUILT.

**POINT OF ERROR THREE (RESTATED)**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN HIS CONVICTION.

**POINT OF ERROR FOUR (RESTATED)**

WHETHER APPELLANT'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT

EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE COURSE OF LAW CLAUSE OF ARTICLE 1 SEC. 19 OF THE TEXAS CONSTITUTION.

**POINT OF ERROR FIVE (RESTATED)**

WHETHER APPELLANT'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

**POINT OF ERROR SIX (RESTATED)**

WHETHER STATE'S EXHIBITS 1-46 (PARTS A-C), 48A AND 162-195 ARE INADMISSIBLE AND INSUFFICIENT EVIDENCE HEREIN TO SUSTAIN APPELLANT'S CONVICTION.

**POINT OF ERROR SEVEN (RESTATED)**

WHETHER THE TRIAL COURT'S CHARGE, INSTRUCTIONS TO THE JURY, AND GENERAL VERDICT FORMS VIOLATE V.A.C.C.P. SEC. 37.07(c) AND THE DUE PROCESS OF LAW

CLAUSES OF THE TEXAS CONSTITUTION AND ARE VAGUE AND UNCERTAIN.

NO. 11-92-00102-CR

IN THE COURT OF APPEALS

FOR THE ELEVENTH SUPREME JUDICIAL

DISTRICT OF THE STATE OF TEXAS

AT EASTLAND

**********

WINSTON WAYNE HUCKABY APPELLANT

VS.

THE STATE OF TEXAS APPELLEE

**********

**APPELLANT'S MOTION FOR REHEARING**

TO THE HONORABLE COURT OF APPEALS:

WINSTON WAYNE HUCKABY, Appellant respectfully says:

I.

The Court of Appeals errs when it does not sustain Appellant's Points of Error One through Five.

**POINT OF ERROR ONE**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THE PRESUMPTION OF INNOCENCE OF APPELLANT ALONE IS SUFFICIENT HEREIN TO ACQUIT HIM.

**POINT OF ERROR TWO**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE REASONABLE DOUBT EXISTS ABOUT HIS GUILT.

**POINT OF ERROR THREE**

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN HIS CONVICTION.

**POINT OF ERROR FOUR**

WHETHER APPELLANT'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE

DUE COURSE OF LAW CLAUSE OF ARTICLE 1, SECTION 19 OF THE TEXAS CONSTITUTION.

**POINT OF ERROR FIVE**

WHETHER APPELLANT'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

VI.

The Court of Appeals errs when it does not sustain Appellant's Points of Error Six and Seven.

**POINT OF ERROR SIX**

WHETHER STATE'S EXHIBITS 1-46 (PARTS A-C), 48A AND 162-195 ARE INADMISSIBLE AND INSUFFICIENT EVIDENCE HEREIN TO SUSTAIN APPELLANT'S CONVICTION.

**POINT OF ERROR SEVEN**

WHETHER THE TRIAL COURT'S CHARGE,

INSTRUCTIONS TO THE JURY, AND GENERAL VERDICT FORMS VIOLATE V.A.C.C.P. SECTION 37.07(c) AND THE DUE PROCESS OF LAW CLAUSE OF THE TEXAS CONSTITUTION AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARE VAGUE AND UNCERTAIN.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Motion for Rehearing be granted and that his conviction be reversed and his acquittal ordered. Alternatively, Appellant's conviction must be reversed and this case remanded for a new trial.

NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

**********

WINSTON WAYNE HUCKABY PETITIONER

VS.

THE STATE OF TEXAS RESPONDENT

**********

APPEALED FROM THE 124TH JUDICIAL DISTRICT COURT OF GREGG COUNTY, TEXAS

**********

PETITION FOR DISCRETIONARY REVIEW

**********

TO THE COURT OF CRIMINAL APPEALS:

**GROUNDS OF REVIEW ONE (RESTATED)**

WHETHER PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THE PRESUMPTION OF INNOCENCE OF PETITIONER ALONE IS SUFFICIENT HEREIN TO ACQUIT HIM.

**GROUNDS OF REVIEW TWO (RESTATED)**

WHETHER PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE REASONABLE DOUBT EXISTS ABOUT HIS GUILT.

**GROUNDS OF REVIEW THREE (RESTATED)**

WHETHER PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED,

BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN HIS CONVICTION.

**GROUNDS OF REVIEW FOUR (RESTATED)**

WHETHER PETITIONER'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE COURSE OF LAW CLAUSE OF ARTICLE 1 SEC. 19 OF THE TEXAS CONSTITUTION.

**GROUNDS OF REVIEW FIVE (RESTATED)**

WHETHER PETITIONER'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

**GROUNDS OF REVIEW SIX (RESTATED)**

WHETHER STATE'S EXHIBITS 1-46 (PARTS A-C), 48A AND 162-195 ARE INADMISSIBLE AND INSUFFICIENT EVIDENCE HEREIN TO SUSTAIN

PETITIONER'S CONVICTION.

**GROUNDS OF REVIEW SEVEN (RESTATED)**

WHETHER THE TRIAL COURT'S CHARGE, INSTRUCTIONS TO THE JURY, AND GENERAL VERDICT FORMS VIOLATE V.A.C.C.P. SEC. 37.07(c) AND THE DUE PROCESS OF LAW CLAUSE OF THE TEXAS CONSTITUTION AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION ARE VAGUE AND UNCERTAIN.

NO. 1413-93

IN THE COURT OF CRIMINAL APPEALS

AT AUSTIN, TEXAS

**********

WINSTON WAYNE HUCKABY APPELLANT

VS.

THE STATE OF TEXAS APPELLEE

**********

**PETITIONER'S MOTION FOR REHEARING**

TO THE TEXAS COURT OF CRIMINAL APPEALS:

The Court of Appeals errs when it does not sustain Appellant/Petitioner's Points of

Error One through Five.

**POINT OF ERROR ONE**

WHETHER APPELLANT/PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THE PRESUMPTION OF INNOCENCE OF APPELLANT/PETITIONER ALONE IS SUFFICIENT HEREIN TO ACQUIT HIM.

**POINT OF ERROR TWO**

WHETHER APPELLANT/PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE REASONABLE DOUBT EXISTS ABOUT HIS GUILT.

**POINT OR ERROR THREE**

WHETHER APPELLANT/PETITIONER'S CONVICTION SHOULD BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN HIS CONVICTION.

**POINT OF ERROR FOUR**

WHETHER APPELLANT/PETITIONER'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY

INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE COURSE OF LAW CLAUSE OF ARTICLE 1, SECTION 19 OF THE TEXAS CONSTITUTION.

**POINT OF ERROR FIVE**

WHETHER APPELLANT/PETITIONER'S CONVICTION MUST BE REVERSED, AND HIS INDICTMENT DISMISSED, BECAUSE HIS CONVICTION BY INSUFFICIENT EVIDENCE IS A SUBSTANTIVE VIOLATION OF THE DUE PROCESS LAW CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Court of Appeals errs when it does not sustain Appellant/Petitioner's Points of Error Six and Seven.

**POINT OF ERROR SIX**

WHETHER STATE'S EXHIBITS 1-46 (PARTS A-C), 48A AND 162-195 ARE INADMISSIBLE AND INSUFFICIENT EVIDENCE HEREIN TO SUSTAIN APPELLANT/PETITIONER'S CONVICTION.

**POINT OF ERROR SEVEN**

WHETHER THE TRIAL COURT'S CHARGE, INSTRUCTIONS TO THE JURY, AND GENERAL VERDICT FORMS VIOLATE V.A.C.C.P. SECTION 37.07(c) AND THE DUE PROCESS OF LAW CLAUSES OF THE TEXAS CONSTITUTION AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARE VAGUE AND UNCERTAIN.

WHEREFORE, PREMISES CONSIDERED, Appellant/Petitioner prays that this Motion for Rehearing be granted and that his conviction be reversed and his acquittal ordered. Alternatively, Appellant/Petitioner's conviction must be reversed and this case remanded for a new trial.

**LETTER FROM**

**COURT OF APPEALS**

Eleventh District of Texas

100 West Main Street

P.O. Box 271

EASTLAND, TEXAS 76448

October 28, 1993

Frank L. Supercinski
Attorney at Law
P.O. Box 189
Longview,TX 75606

David Brabham
District Attorney
101 East Methvin
Longview,TX 75601

Re: Case No. 11-92-00102-CR
Trial Court No. 19,355-B
Style: Huckaby, Winston Wayne
v. The State of Texas

Dear Counsel:

The Court has this day OVERRULED Appellant's motion rehearing in the above cause.

**LETTER FROM**

**COURT OF APPEALS**

Eleventh District of Texas
100 West Main Street
P.O. Box 271
Eastland, Texas 76448

November 22, 1993

Frank L. Supercinski David Brabham

| | |
|---|---|
| Attorney at Law | District Attorney |
| P.O. Box 189 | 101 East Methvin |
| Longview, TX | Longview, TX |
| 75606 | 75601 |

RE: Case No. 11-92-00102-CR

Trial Court No. 19,355-B

Style: Huckaby, Winston Wayne

v. The State of Texas

Dear Counsel:

Please be advised that we have this day received and filed Petition for Discretionary Review in the above cause.

**POSTCARDS**

**OFFICIAL NOTICES FROM**

**Court of Criminal Appeals**

P.O. Box 12308, Capital Station

Austin, Texas 78711

RE: Case No. 1413-93

STYLE: HUCKABY, WINSTON WAYNE

From Thomas Lowe, Clerk

Mailed to: Frank L. Supercinski

123 Gilmer Road

Suite 2

P.O. Box 189

Longview, TX 75606

December 10, 1993. I have this day received and filed the Appellant's petition for discretionary review.

March 16, 1994. On this day, the Appellant's Petition for Discretionary Review was refused.

March 30, 1994. On this day, the Appellant's motion for rehearing was filed with this court.

May 18, 1994. On this day Appellant's motion for rehearing was denied.